(16)

No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, *et al.*,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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COUNTER-STATEMENT OF THE CASE

There has been no issue of more concern to rail labor than the present one of toxicological testing. Unfortunately, some critics' perception seems to be that because labor is contesting the Federal Railroad Administration's (hereinafter "FRA") rulemaking, we condone alcohol and drug usage. Nothing could be further from the truth. Rail labor yields to no one in its goal to improve rail safety. The country has a right to a safe railroad industry, free from impairment by alcohol or drug use. Nevertheless, the Government's war on drugs, and FRA's actions in mandating and authorizing toxicological testing of railroad workers, must have some boundaries. The laudable goal of a drug-free rail industry must not be reached by means which exceed the confines of the Constitution, nor which nullify the Bill of Rights.

The Petitioners assert that a serious safety problem exists in the railroad industry because of alcohol or drug use (Pet. Br. 3-4).[1] We do not suggest that even one accident or incident caused by alcohol or drugs is not a serious matter. Yet, in view of the statistical frequency of such accidents, and in the overall scheme of things, large scale toxicological testing of railroad employees is an unreasonable approach to the problems of rail safety. There are presently available less intrusive and equally effective methods to accomplish the regulations' objectives.

The record below demonstrates that between 1975 to 1984, there were 76,295 train accidents, 116,127 train incidents, and 433,297 non-train incidents on the nation's railroads.[2] Of these 626,000+ accidents/incidents, alcohol and drug impairment may have been involved in only 28 train accidents and 20 train incidents, resulting in 37 fatalities and 80 injuries, or 76/10,000 of 1 percent of the total accidents/incidents during this 10-year period. *See* 50 Fed. Reg. 31,508, and 31,517-23 (August 2, 1985).

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[1] The Petitioners (Pet. Br. 2-3) rely in part on a study conducted in 1978 known as "REAP." That study has serious deficiencies. Among the 7 railroads participating in the 1978 study, the selected sample of employees were mailed questionnaires covering 289 items. The self-reporting responses to questionnaires raise considerable problems of reliability.

[2] These statistics are taken from Accident/Incident Bulletins Nos. 144 through 155 for 1975-1984 (U.S. Dept. of Transportation, FRA Office of Safety).

A train accident is defined as a collision, derailment, or other event involving the operation of railroad on-track equipment resulting in physical property damages that exceed a threshold determined by the FRA pursuant to 49 C.F.R. § 225 *et seq*. The current threshold is $5,200.00).

A train incident is an event involving the movement of railroad on-track equipment that results in a death, a reportable injury, or a reportable illness, but in which railroad property damage does not exceed $5,200.00. A non-train incident is an event arising out of railroad operations but does not exceed $5,200.00 in property damage, and results in a death, a reportable injury or a reportable occupational illness.

The Petitioners' brief presents a somewhat distorted view of the factual setting, and therefore does not identify some of the Respondents' major concerns with the FRA's testing regulations. Some of these concerns are:[3]

1. The rule covers only those employees subject to the Federal Hours of Service Act. 49 C.F.R. § 219.5(d). As a result, all management personnel are excluded, including those in safety sensitive positions, and all employees on short line railroads employing less than 15 persons are not covered. Furthermore, the rule permits the anomaly of covering certain crafts of employees, and not other crafts which perform the same job function;

2. The rule mandates that the employee "consent" to the testing. 49 C.F.R. § 219.11. The sanction for not consenting to the test is a 9-month disqualification. 49 C.F.R. § 219.213(a)(1). The railroads are free to impose harsher sanctions, and even discharge the employee. 49 C.F.R. § 219.213(a)(3);

3. The rule sets an alcohol level of .04% in the blood as impairment *per se*. 49 C.F.R. § 219.101(a)(2)(ii). With respect to controlled substances, however, no threshold level is set. The FRA recognizes that urine tests cannot measure impairment, and therefore cannot distinguish between use off the job and current impairment. 49 C.F.R. § 219.309(b)(2). Yet, the regulations permit railroads to impose an absolute prohibition of alcohol or any drugs in employees' bodily fluids. 49 C.F.R. § 219.101(c). As a result, many railroads have revised their rules to prohibit "a blood alcohol content greater than 0.00 percent" (J.A. 158) and to provide that "any employee testing positive for a controlled substance (or its metabolite) in the urine is presumed to be under the influence of such drugs." (J.A. 119-124). Thus, as the FRA described in its Field Manual, "positive laboratory reports may result in the railroad taking disciplinary action against the employee, potentially resulting in the loss of employment" (even without any showing of impairment). *See* FRA *Field Manual:*

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[3] These are not necessarily listed in order of importance.

Control of Alcohol and Drug Use in Railroad Operation (March 1986) Unit D, § 1.0, p. D-1 (hereinafter "FRA Field Manual"). Also, a railroad is required to inform the employee that because of the sensitivity of the urine test, it may reveal whether or not a person has used drugs up to 60 days before a sample is collected. 49 C.F.R. §219.309(b)(2). Nevertheless, any positive test will create a presumption that the employee was impaired at the time the sample was taken. (*Id*). The effect of the above is that even the very smallest detectable amount of metabolite will subject an employee to disciplinary sanctions by the railroads;

4. The events which mandate testing are contained in the regulations at 49 C.F.R. §219.201(a), and those which authorize testing are located at 49 C.F.R. § 219.301(b). In each of these situations a toxicological test is mandated or authorized regardless of what caused the accident or incident. The record below identifies an example in which an entire crew was tested in Arkansas on March 11, 1986, because of a derailment resulting from tornado-like winds (J.A. 137-139). Such a case evinces the potential for abuse of the testing practices and constant harassment of employees, and exemplifies the "randomness" of the testing;

On the other hand, no tests are required at highway grade crossing accidents even though a majority of all deaths on the railroads occur in such accidents. *See* 49 C.F.R. § 219.201(b);

5. The rule incorporates the notion of suspicion by association in that the entire crew of a train is required to be tested under the Subpart C post-accident mandatory testing even though such persons may not have been involved in the event which gave rise to the test. 49 C.F.R. § 219.203(a)(2). The only exception is where the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause of the accident. 49 C.F.R. § 219.203(a)(3)(i). Also, under the so-called reasonable cause testing of Subpart D, there is nothing to prevent a railroad from testing the entire crew after an accident or incident. *See* 49 C.F.R. § 219.301(b)(2);

6. The FRA instructs railroads to collect urine samples in compliance with its Field Manual. *See* 49 C.F.R. § 219.205(a). The Field Manual requires that each urine sample be provided under the "direct observation" of technicians, and failure of an employee to provide a sufficient amount of urine may result in disciplinary action. FRA Field Manual, D-5 (1986).

7. The hearing procedure in the rule is restricted to questioning only the reasons behind the employees refusal to take the test. 49 C.F.R. § 219.213(c);

8. An employee may be tested even for a relatively minor rule violation, regardless of whether such employee is suspected of being impaired by alcohol or drugs. 49 C.F.R. § 219.301(b)(3);

9. Under the so-called reasonable suspicion testing, two supervisors must concur if drug impairment is suspected, but only one supervisor is required to have only 3 hours of special training in signs of drug intoxication. 49 C.F.R. § 219.302(c)(2);

10. Nothing in the regulations restrict full discretion available to a railroad to conduct testing beyond that mandated in Subpart C or authorized in Subpart D. 49 C.F.R. § 219.305(e). There is no requirement that a railroad which conducts additional testing need confirm an initial positive immunoassay test. This is so even though the FRA made clear that, under its rule, an immunoassay would not constitute an acceptable confirmatory test (49 C.F.R. § 219.307(b)) because such tests "generally carry the potential for a known percentage of 'false-positive' results." 50 Fed. Reg. 31,555 (August 2, 1985); (*see also* Pet. Br. 12, n.17);

11. The laboratories performing the post-accident tests are not required to be certified,[4] nor have they been sufficiently competent. As initially promulgated, the FRA regulations

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[4] On the other hand all testing of federal employees pursuant to the Presidential Executive Order No. 12564 must be performed by certified laboratories. *See* 53 Fed. Reg. 11,970 (April 11, 1988).

designated the Civil Aeromedical Laboratory in Oklahoma City ("CAMI") to conduct all Subpart C testing. *See* 50 Fed. Reg. 31,572 (August 2, 1985). However, because of falsification of test results and other irregularities, (*see House Comm. on Government Operations, Failing The Test: Proficiency Standards Are Needed For Drug Testing Laboratories*, H.R. Rep. No. 727, 100th Cong., 2d Sess. 10 (1988)), effective March 30, 1987, CAMI's relationship was terminated and such tests are now being performed by the Center for Human Toxicology at the University of Utah. 49 C.F.R. Part 219, App. B. With respect to all other testing authorized under Subpart D of the rule, each railroad has sole discretion to choose any laboratory it desires, with very limited restrictions, and the laboratory need not be certified;

12. As conceded by Petitioner (Pet. Br. 10 fn. 15) there is a lack of guarantee of confidentiality in the regulations. The FRA may release testing results to prosecutors.

Because of these and other concerns, which indicate the unreasonableness of the FRA rulemaking, the Respondents commenced this action on October 31, 1985, seeking declaratory and injunctive relief against enforcement of the regulations.

SUMMARY OF ARGUMENT

A. Forced administration of a blood test clearly implicates the search and seizure provisions of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). The Petitioners have conceded that testing under Subpart C of the regulations (the mandatory testing) must be regarded as a Fourth Amendment search, and that testing under Subpart D of the regulations (the authorized testing) should be regarded as a search if the testing is deemed state action. (Pet. Br. 25, n.26). By the FRA's own admission, the testing requirements of Subpart D have been authorized because the railroads would not otherwise be allowed to test. *See* 50 Fed. Reg. 31,528 (August 2, 1985). This federal regulatory "imprimatur," *see Railway Employees' Department v. Hanson*, 351 U.S. 225, 232 (1956), evinces such significant encouragement that the decision to conduct testing under Subpart D of the regulations cannot be deemed a consequence of private initiative. Because

Subpart D testing is state action under this analysis, it should be regarded as a Fourth Amendment search. The virtually unanimous opinion of lower courts and commentators alike supports such a finding. *See, e.g., Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 580 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988); *National Federation of Federation Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987).

B.1. The crux of this case is whether compulsory drug and alcohol tests, without particularized suspicion of impairment, constitute "unreasonable" searches and seizures. The Petitioners do not contend that the occurrence of an accident/incident or rule violation creates individualized suspicion of impairment (Pet. Br. 18). Rather, they argue that individualized suspicion is not required (Pet. Br. 17, 22). It follows that the regulations fail constitutional muster if the Court determines that individualized suspicion is a requisite to the alcohol and drug tests of railroad workers. In determining the standard of reasonableness governing searches, the Court has employed a number of different criteria. Because of the safety concerns, this case involves "special needs, beyond the normal need for law enforcement" which justifies application of the twofold inquiry of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *See Id.* at 351 (Blackmun, J., concurring). In order to be reasonable under this inquiry, a search must be "justified at its inception" and "reasonably related in scope" to the circumstances justifying the search. *Id.* at 341. The FRA regulations fail both prongs of this *T.L.O.* test.

2. The record below indicates that only 5.0% of the individuals sampled under Subpart C of the regulations (through December 31, 1987) tested positive for the presence of alcohol or medically unauthorized controlled substances (J.A. 193). Because an overwhelming 95% of the employees test negative, the FRA has no reasonable grounds for suspecting that searching an employee will turn up evidence of impairment. Nor does the mere occurrence of an accident or incident provide reasonable grounds for suspecting that drug or alcohol use played any role in the event. Additionally, because neither blood nor urine tests can measure drug impairment (*see* Denenberg and Denenberg, *Drug Testing From The Arbitrator's Perspective*, 11 Nova L.Rev. 371, 403

(1987); Hawks, *The Analysis of Cannabinoids in the Biological Fluids*, National Institute on Drug Abuse, Monograph No. 42, at 4 (1982); Mcbay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 Nova L.Rev. 647, 649 (1987)), the Government's interests in conducting such tests are severely weakened. Since the goal of the regulations is to prevent accidents caused by impairment (and impairment is what is prohibited *see* 49 C.F.R. § 219.101(a)), testing which cannot determine the degree of impairment is unjustifiable. There is an insufficient nexus between what the test can reveal, and what the regulations are trying to accomplish.

C. The Court has allowed exceptions to the requirement of individualized suspicion, but only where the "privacy interests implicated by a search are minimal" and where "other safeguards" exist to limit the discretion of the official in the field. *T.L.O.*, 469 U.S. at 342, n.8.

1. The privacy interests of railroad workers cannot be characterized as minimal. This Court has recognized that "even a limited search of the person is a substantial invasion of privacy." *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). Blood testing under the regulations requires actual intrusions into employees' bodies, and urine testing involves a psychological intrusion of tremendous proportions. Employees lose all bodily control as they are forced to urinate on demand under the watchful eye of medical facility technicians. Urine testing produces distinct feelings of humiliation, degradation, anger, anxiety over errors, etc. Because blood, breath, and urine tests under the FRA rule are founded on distrust, and stigmatize employees, they are distinguishable from ordinary medical examinations. The intrusion is made even more frightening by the fact that each employee's job and future is at stake, and the testing is fraught with many inaccuracies. The literature is replete with discussions of the incompetency of laboratories and the inaccuracy of test results. *See, e.g.*, Hudner, *Urine Testing For Drugs*, 11 Nova L.Rev. 553, 554-558 (1987); M. Rothstein, *Medical Screening of Workers*, 71 (1984). The fact that testing is conducted as an aspect of an employment relationship does not reduce either the intrusiveness of the searches, or the reasonableness of employees' privacy expectations. Employees' blood, breath,

and urine are not things which a railroad ordinarily has, nor must have, access to in order to meet its safety needs.

2. The closely-regulated industry exception to individualized suspicion is inapplicable to drug and alcohol testing of railroad employees. This Court has never extended the closely-regulated industry exception to searches of persons, but has applied it only to searches of property, where the invasion was limited. Indeed, the exception has been justified by the impersonal nature of the searches, which entail limited invasions upon privacy, and are not aimed at the discovery of criminal evidence. *See Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Even if the exception were extended to persons, it should not be applied here because railroad workers are not a highly regulated industry. Regulation of railroad employees has been neither pervasive nor long standing, and has not reduced privacy expectations over their bodies and bodily fluids. *See New York v. Burger*, 107 S.Ct. 2636, 2643 (1987).

3. Railroad supervisory personnel are given tremendous discretion in determining whether a test is to be conducted. Supervisors are required to make immediate on-the-scene evaluations of property damage. *See* 49 C.F.R. § 291.201(c). They alone determine whether the rule which triggers the test has been violated. *See* 49 C.F.R. § 219.301(b)(3). Supervisors with virtually no training are allowed to make judgments as to reasonable suspicion of impairment. *See* 49 C.F.R. § 219.301(b)(1). The ultimate discretion is delegated to railroads by allowing them to perform tests under any conditions they may wish. *See* 49 C.F.R. § 219.305(e). Because employees' privacy interests are not minimal, and because there are insufficient safeguards to limit official discretion, an exception to the requirement of individualized suspicion would be inappropriate in this case.

D. The Petitioners argue that the regulations serve compelling governmental interests because they (1) will help to deter alcohol and drug use on the job; (2) permit greater precision of the causes of major accidents, and (3) found alternative approaches wanting. As to each of these the Petitioners' rationale is flawed.

1. First, an employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test. The truth is that alcohol and drug users do not believe they will be caught by any web of testing.

2. Secondly, obtaining better data does not justify invasive testing. The causes of railroad accidents can be determined by lesser intrusions (*see infra* 40-43), and still reliable evidence can be gathered concerning the cause of an accident. We do not question that the public interest justifies determining the cause of each railroad accident. Rather, the issue is whether the government is prevented from ascertaining the cause of an accident if particularized suspicion is required before a search is permitted. It clearly is not if the other less intrusive means identified in this brief are adopted.

3. Lastly, where certain fundamental rights are involved, the Court has required that regulations be narrowly drawn. In the context of the Fourth Amendment, the Court has stated that searches may not be overly broad in scope. *See Terry v. Ohio*, 392 U.S. at 19; *cf. New Jersey v. T.L.O.*, 469 U.S. at 341 (requiring that searches be reasonably related in scope to the circumstances justifying the search). There are presently available a number of less drastic and equally effective means to address the government's safety needs, including, but not limited to, voluntary co-operative agreements between employees and the railroads, improved detection training, tesing akin to roadside sobriety tests, and increased supervision of employees.

E. The Implied Consent provision, 49 C.F.R. § 219.11, cannot validate the searches. The Fourth Amendment requires that a consent not be coerced, by implied threat or covert force. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Because employees refusing to provide blood or urine samples are subject to a nine month suspension (*see* 49 C.F.R. § 219.213), the FRA has imposed an unreasonable choice upon the employees, and the consent feature is therefore invalid.

ARGUMENT

I. THE FRA REGULATIONS ARE UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT

A. The Drug And Alcohol Testing Mandated And Authorized By 49 C.F.R. Part 219 Constitutes A Search And Seizure Within The Meaning of the Fourth Amendment.

1. It is well-settled that compulsory administration of a blood test implicates the search and seizure provisions of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966). For this reason, the Petitioners have conceded that post-accident testing under 49 C.F.R. Part 219, Subpart C, must be regarded as a Fourth Amendment search. (Pet. Br. 24-25, n. 26). Petitioners also concede that testing authorized by Supbart D should be considered a Fourth Amendment search if such testing can be regarded as governmental action. *Id.*

The fact that Subpart D testing is only authorized, and not required, by the FRA regulations does not mean that the testing is not governmental action. The Court made it clear in *Jackson v . Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), that state action would be found if "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 351. The Court has recognized that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *see also, Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357.

Analysis of the FRA regulations reveal such significant governmental participation in, and encouragement of, Subpart D testing, that the testing must be deemed "government action." First of all, the regulations are applicable to all railroads, with only few specified exceptions. 49 C.F.R. § 219.3. Railroads are subject to civil penalties for conducting "for cause" testing outside the parameters of Subpart D. 49 C.F.R. § 219.9(a)(5). Second, the regulations preempt any state law covering the same subject matter, including any state law on the subject of "for cause" testing. *See* 49 C.F.R. § 219.13. Third, the regulations authorize testing by the railroads, they specify the observations and events for which testing is authorized, they specify evidentiary standards for determining whether tests are required, and list the prohibitions which apply to both Subpart C and D. *See* 49 C.F.R. § 219.101, and § 219.301. Fourth, the regulations explicitly set forth the precise procedures and safeguards governing breath and urine tests, and require that urine sampling and testing be conducted at an independent medical facility. *See* 49 C.F.R. §§ 219.303, 219.305, and 219.307. Recommended practice standards for Subpart D testing are also set forth in the FRA Alcohol and Drug Field Manual. *See* 49 C.F.R. § 219.19. Finally, the regulations allow a railroad to make a presumption of impairment in the event an employee refuses to take a blood test after a urine sample has tested positive, and requires the railroad to provide effective notice of the preemption. 49 C.F.R. § 219.309.

By the FRA's own admission, it has authorized these requirements precisely because absent this federal regulatory imprimatur, the railroads could not engage in the testing. *See* 50 Fed. Reg. 31,528 (August 2, 1985); Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982). Under these circumstances, it is specious for the Petitioners to argue that Subpart D testing is not federal action. It is *solely* by virtue of the contested regulations that railroads have the authority to test. Subpart D is more than a mere authorization to the railroads to test under specified circumstances. It is the regulations which relieve the railroads of the constraints of its labor contracts and of state laws. 50 Fed. Reg. 31,528 (August 2, 1985). The regulations are the source of power and authority by which the railroads can conduct Subpart D testing. *Cf. Railway Employees' Department v. Hanson*, 351 U.S. 225, 232 (1956) (held that otherwise private conduct under a union shop agreement was state action because a federal statute authorized such agreements and preempted state law on the subject). The regulations evince such significant encouragement that the decision to conduct the testing cannot be deemed a consequence of private choice and initiative. *See Railway Labor Executives' Association v. Burnley*, 839 F.2d 575, 581-582 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988).

2. The virtually unanimous opinion of lower courts and commentators alike is that compulsory urine testing is materially indistinguishable from the blood testing in *Schmerber*, and therefore qualifies as a Fourth Amendment search. *See, e.g., RLEA v. Burnley*, 839 F.2d at 580; *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *cert granted*, 108 S.Ct. 1072 (1988); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Everett v. Napper*, 833 F.2d 1507, 1509 (11th Cir. 1987); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1542 (6th Cir. 1988); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.), *cert. denied*; 429 U.S. 1029 (1976); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434 (N.D. Ill. 1987); Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing* (hereinafter *Behind Open Doors*) 11 Nova L. Rev. 307, 328 (1987); Imwinkelreid, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 Nova L. Rev. 563, 571 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L. Rev. 605, 616 (1987).[5] Those courts which have

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[5] Although most courts and commentators refer to urinalyses as Fourth Amendment "searches," the "seizure" provision is also applicable. *Schmerber*, 384 U.S. at 767 ("Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment"). Urine testing under the regulations can take several hours' time. *See* U.S. General Accounting Office, Report to the Hon. John Heinz, U.S. Senate, RAILROAD

considered the question have also found breath tests to be Fourth Amendment searches. *E.g.*, *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986); *see also*, *Shoemaker v. Handel*, 795 F.2d at 1141; *RLEA v. Burnley*, 839 F.2d at 580; *People v. Carlson*, 677 P.2d 310, 317 (Colo. 1984).

Analysis of Court dicta regarding the Fourth Amendment's purposes further supports the proposition that urine testing for drugs constitutes a search and seizure. In *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court emphasized that the Fourth Amendment "protects people, not places." Indeed, the basic purpose of this Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978). Logically, it follows that Fourth Amendment protections are greatest in the context of personal searches.

Concurring in *Katz*, 389 U. S. at 361, Justice Harlan set forth an oft-cited twofold requirement for determining the applicability of the Fourth Amendment: "first that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Application of this test to the present case compels the conclusion that compulsory urine tests are Fourth Amendment searches and seizures.

All people exhibit a subjective expectation of privacy in the act of urination, one of the most private of all activities. This expectation is undoubtedly one that society is prepared to consider reasonable. (*see infra* 20-23). "There are few other times where individuals insist as strongly and universally that they be let alone to act in private." *Lovvorn v. City of Chattanooga*, 846 F.2d at 1542. Governmental interference

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SAFETY, Reporting Time Frames and Results of Post Accident Drug Tests, at 4 (April 1988) (GAO-RCED 88-120). The liberty of these employees is unquestionably restrained at such times, thereby making urine testing a seizure as well as a search.

with this expectation, therefore, constitutes a Fourth Amendment search. *See RLEA v. Burnley*, 839 F.2d at 580.

B. The Fourth Amendment Requires Particularized Suspicion Before Railroad Workers May Be Tested For Drug Or Alcohol Impairment

1. The Appropriate Standard of Reasonableness.

To hold that the Fourth Amendment applies to compulsory blood tests and urinalyses is only to begin the inquiry into the standards governing such searches. *See New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). The Fourth Amendment expressly prohibits only "unreasonable " searches. *Carroll v. United States*, 267 U.S. 132, 147 (1925). The critical issue in this case, therefore, is whether compulsory urinalysis or blood testing of railroad workers, without particularized suspicion of impairment, constitutes an "unreasonable" search. The Petitioners do not contend that the occurrence of an accident/incident or rule violation creates individualized suspicion of impairment (Pet. Br. 18). Rather, they argue that individualized suspicion is not required (Pet. Br. 17, 22). It follows that the regulations fail constitutional muster if the Court determines that individualized suspicion is a requisite to the alcohol and drug tests of railroad workers.[6]

The Court has repeatedly stated that the determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *New Jersey v. T.L.O.*, 469 U.S. at 337 (*quoting Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967)); *Terry v. Ohio*, 392 U.S. 1, 21

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6 Even assuming *arguendo* that the Court does not hold individualized suspicion a requisite here, we still believe the regulations are unconstitutional. The searches here cannot satisfy the two prong test of *New Jersey v. T.L.O.*, that the searches are justified at the inception and reasonably related in scope to the circumstances which justified the search. (*See infra* 17-20).

(1968). The Court has supplemented this amorphous requirement with more particular criteria. The traditional rule is that searches conducted outside the judicial process, *i.e.*, without a warrant, are *per se* unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions. *See Katz v. United States*, 389 U.S. at 357 (1967); *Accord Camara v. Municipal Court*, 387 U.S. at 528-529; *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987) (plurality opinion).[7] This rule acknowledges the requirement of "prior judicial judgment" contemplated by the Fourth Amendment. *See United States v. United States District Court*, 407 U.S. 297, 317 (1972).

The Court has applied different criteria, however, in "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); *O'Connor v. Ortega*, 107 S. Ct. at 1500. Thus, in *New Jersey v. T.L.O.*, 469 U.S. at 341, the Court enunciated the following test of reasonableness:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception.' *Terry v. Ohio*, 392 U.S. at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'

7 There are a number of such exceptions: (1) searches incident to a lawful arrest, *Weeks v. United States*, 232 U.S. 383 (1914); (2) the "automobile exception," *Carroll v. United States*, 267 U.S. 132 (1925); (3) hot pursuit, *Warden v. Hayden*, 387 U.S. 294 (1967); (4) stop and frisk, *Terry v. Ohio*, 392 U.S. 1 (1968); (5) plain view, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (6) border searches, *United States v. Ortiz*, 422 U.S. 891 (1975); (7) administrative searches of closely regulated industries, *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) *cert. denied*, 479 U.S. 986 (1986); (8) inventory searches, *Illinois v . LaFayette*, 462 U.S. 640 (1983); *Michigan v. Thomas*, 458 U.S. 259 (1982); *South Dakota v. Opperman*, 428 U.S. 364 (1976); (9) searches of school children's possessions at school, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); (10) consent, *United States v Mendenhall*, 446 U.S. 446 U.S. 544 (1980); *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), Bookspan, *Behind Open Doors*, 11 Nova L.Rev. at 331, n.117.

The Respondents contend that the search of railroad employees under the FRA regulations is governed by this *T.L.O.* twofold test of "reasonableness under all the circumstances." *See Id.* at 341 and 351; *RLEA v. Burnley*, 839 F.2d at 587.[8]

2. Application Of The Twofold Inquiry To The Facts In This Case.

In *T.L.O.* the Court held that a search of a student by school officials would be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. at 342. Such a search would be permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive . . . ." *Id.* Applying these standards to the present case indicates that the FRA regulations are unconstitutional.

8 We acknowledge that the exigencies of drug and alcohol testing, *i.e.* the disappearance of evidence in blood and urine over time, make the warrant requirement impracticable in *some* circumstances. Yet there are circumstances, especially under Subpart D, in which adherence to the traditional warrant requirement would be both possible and preferable. The Petitioners concede that evidence of drug use remains in urine for several days (Pet. Br. 42, n.45), and in some cases can remain up to sixty days. 49 C.F.R. § 219.309(b)(2); 50 Fed. Reg. 31,550 (August 2, 1985). Where a breath test reveals no alcohol impairment, there is no reason why urine testing for drugs cannot await determination by an impartial magistrate that probable cause or the requisite level of suspicion has been met.

Statistical evidence compiled in the record below shows that from February 10, 1986, through December 31, 1987, 1,508 individual railroad employees were tested under Subpart C of the regulation,[9] and only 76 individuals (5.0%) tested positive for the presence of alcohol or medically unauthorized controlled substances (J.A. 193).[10] Obviously, this means that each time the FRA requires an individual to be tested under Subpart C, the overwhelming probability (95%) is that no evidence of a violation will be revealed by the search. Such searches are clearly unjustified under *T.L.O.* because no reasonable grounds exist to suspect that testing an employee will turn up evidence. *See also, Delaware v. Prouse*, 440 U.S. 648, 659-660 (1978).

As more eloquently stated by Judge H. Lee Sarokin in *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D. N.J. 1986):

> If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.

Moreover, because the testing is triggered by the occurrence of an event, and not by any suspicion of impairment, such testing by definition is not justified at its

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[9] Under Subpart C, testing is required for each crew member of any train involved in a major train accident, an impact accident, or a fatal train incident. 49 C.F.R. § 219.201(a) and § 219.203(a)(2). Note exceptions in § 219.201(b) and § 219.203(a)(3) for Subpart C testing. There are no exceptions to testing the entire crew under Subpart D.

[10] These figures indicate "positives" (*i.e.* any metabolite in a sample of urine, or blood, or both). Because blood and urine testing cannot measure impairment, (*see infra* 19-20) the actual number of positives (*i.e.*, actual impairment as opposed to samples containing drug metabolites) are lower than the 5.0% indicated.

inception under *T.L.O.* As noted *supra* at 2, alcohol or drug impairment may have played a part in only 76/10,000 of 1 percent of the total accidents/incidents between 1975 and 1984. The occurrence of an accident/incident, by itself, does not provide reasonable grounds for suspecting that tests will demonstrate impairment in any one employee, much less an entire train crew. *See RLEA v. Burnley*, 839 F.2d at 587.

The same reasoning applies to toxicological testing under Subpart D. Insofar as Subpart D testing can be triggered by an accident/incident, or a rule violation, regardless of whether impairment is suspected, such testing is not justified at its inception. The *T.L.O.* test requires that a railroad have reasonable grounds for suspecting that the search will turn up evidence of a violation. In the regulations such evidence must be of use or impairment by alcohol or drugs while assigned to duty. Testing after an accident/incident, or rule violation lacks the requisite level of suspicion.

Nor are such searches permissible in scope under the *T.L.O.* test. The stated purpose of the regulations is "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol and drugs." 49 C.F.R. § 219.1. To this end, the regulations prohibit "impairment" and the use or possession of alcohol or drugs while assigned to covered service. 49 C.F.R. § 219.101. Yet the methods adopted by the regulations do not reasonably relate to this laudable purpose, or reasonably follow from these legitimate prohibitions.

The literature on drug testing conclusively establishes that neither blood nor urine tests can measure current drug intoxication or degree of impairment. *See* Dubowski, *Drug Use Testing: Scientific Perspectives*, 11 Nova L. Rev. 415, 526-529 (1987); Denenberg and Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 Nova L.Rev. 371, 403 (1987); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.Rev. 605, 632 (1987); Hawks, *The Analysis of Cannabinoids in the Biological Fluids*, National Institute on Drug Abuse, Monograph No. 42, at 4 (1982); Morgan, *Problems of Urine Screening for Misused Drugs*, 16 J. Psychoactive Drugs 305,

306 (1984)[11] The FRA concedes as much in the regulations, 49 C.F.R. § 219. 309(b)(2); *see also* 50 Fed. Reg. 31,513 (August 2, 1985), in that they require railroads to provide notice of this fact to each employee tested under Subpart D. The tests do not indicate how much may have been used, when it was used or what were the effects of such use. This severely weakens the Government's interests in mandating and authorizing such tests. Since the goal of the regulations is to prevent accidents caused by impairment, testing which cannot determine the degree of impairment is unjustifiable. There is an insufficient nexus between what the test can reveal, and what the regulations are trying to accomplish.

The shortcomings of urine testing are more egregious under Subpart D. Blood tests, though available to employees, are not required by the railroads or authorized by the FRA. Yet, under the presumption of impairment provision, 49 C.F.R. § 219.309(a), an employee who exercises his right to provide only a urine sample may be disciplined or terminated for conduct which does not violate the regulations, in that metabolites remaining in urine from past off the job drug use (in rare cases up to 60 days) can be detected. This provision can thereby transform off duty conduct, having no relation to job performance or impairment, into a violation. The scope of such a search is clearly impermissible. Indirectly regulating off duty conduct is not reasonably related to the asserted goal of the regulations.

That such testing may provide important information to the public, or may make possible "enlightened and proportional regulation" by the FRA (Pet. Br. 12-13), is not enough to satisfy the second prong of the *T.L.O.* test. Such abstract and unquantifiable societal benefits do not outweigh the concrete injuries repeatedly suffered by innocent railroad workers under the regulations. The deterrent value of such tests is highly questionable, and certainly bears a tenuous connection to the regulations' stated purpose.

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[11] Blood tests can determine recent usage, but not impairment.

C. The Significant Privacy Interests of Railroad Workers And The Wide Discretion Afforded Railroad Officials Render Any Exception To Particularized Suspicion Inappropriate.

The Court has allowed exceptions to the requirement of particularized suspicion "only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field'." *New Jersey v. T.L.O.*, 469 U.S. at 342, n.8 (citations omitted). We believe that the FRA regulations cannot be justified through this exception because the railroad workers' privacy interests are not minimal, and neither are there sufficient safeguards to limit the discretion of the official in the field.

1. Railroad Employees' Privacy Interests Are Not Minimal

There are a host of reasons why the privacy interests of railroad employees cannot be characterized as minimal. By evaluating the intrusiveness of the testing, realizing the potential harms the employees may suffer under the FRA rule, and recognizing that employment in a safety sensitive industry does not strip employees of constitutional protection, the significance of railroad employees' privacy interests becomes more evident. In truth, the extent of these privacy interests may depend on whose ox is being gored. To the individual being tested, there are distinct feelings of humiliation, offensiveness, anger, distrust, distress, emotional pain, concern, apprehension, and anxiety over errors, etc. *See Taylor v. O'Grady*, 669 F. Supp at 1434. Not the least of these major concerns is that each employee's job and future is at stake. It may be difficult for those persons not the focus of such a test to fully comprehend its intrusiveness. Yet it is absurd for the Petitioners to characterize the tests as a mere "inconvenience" (Pet. Br. 19), or to say that railroad workers "may feel self-conscious" about the collection process (Pet. Br. 35).

The Court has acknowledged that "even a limited search of the person is a substantial invasion of privacy." *Terry v. Ohio*, 392 U.S. at 24-25. Blood testing involves physical intrusions into the human body. *See* 50 Fed. Reg. 31,513 (August 2, 1985). While it may be a routine procedure in some circumstances, *see Schmerber v. California*, 384 U.S. at 771, it is hardly routine here. The greater risk of error, risk of job loss, and the quasi-criminal nature of the search, act to easily distinguish such a test from ordinary physical or medical examinations. While there is an element of trust in a medical examination, the test under the FRA rule is founded on distrust, and stigmatizes the employee as a suspected law breaker. Otherwise satisfactory employees[12] must prove themselves innocent of drug and alcohol violations by exposing their private parts and supplying bodily fluids for scrutiny.

Urine tests may not involve actual intrusions into the body, but the overall intrusiveness of such tests cannot be denied. The act of urination is undoubtedly one of the most private of all functions, as to which virtually all people exhibit an expectation of privacy. It is a function ordinarily performed in private, if not in solitude, and which is usually prohibited in public. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D. N.J. 1986); *NTEU v. Von Raab*, 816 F.2d at 175. Although urine, unlike blood, is routinely and necessarily discharged from the body, "it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference." *Capua*, 643 F. Supp. at 1513.

Breath tests, although concededly less invasive than blood or urine tests, are by no means minor intrusions. As construed in arbitration and in the courts, compulsory breath tests constitute a "major dispute"; such tests are unauthorized by many collective bargaining agreements. *See* Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982); 50 Fed. Reg. 31,528 (August 2, 1985).

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12 Assuming that otherwise unsatisfactory employees would not be discharged from service by the railroads.

Nor can it seriously be doubted that this expectation of privacy is one which society is prepared to recognize as reasonable. Although the government has a strong interest in general public safety, the regulations unnecessarily and impermissibly slight the privacy expectations of railroad workers. Urine testing deprives railroad workers of all bodily control. Being forced to urinate on demand, in the presence of a monitor, or being forced to drink liquids until a sample can be provided, is a governmental intrusion of tremendous proportions. Ordinarily, a person expects to control both the timing and the ultimate disposition of his urine. The fact that blood and urine samples are required to be collected at an independent medical facility, 49 C.F.R. § 219.305(a), does little to reduce the intrusiveness of the sampling. The regulations require that sample collection be supervised under the watchful eyes of technicians of the medical facility.[13] *Id.*; *see also* FRA Field Manual, Unit D, ¶¶ 4.5.2 and 4.5.3 at p. D-5. In addition to the loss of bodily control, and the supervised urination, it is humiliating and degrading for railroad workers to realize that submission to this type of test is the only way to vindicate themselves.

The drug and alcohol tests entail significant psychological intrusions. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558-560 (1976); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). In the testing under the Secretary's regulation, the intrusiveness under certain conditions even exceed some criminal searches. The psychological intrusion of administrative searches are ordinarily relatively low because stigma and fear are essentially absent. *See Camara v. Municipal Court*, 387 U.S. at 530, LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Sup. Ct. Rev. 1, 19 (1967). By contrast, the psychological intrusion in the drug and

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13 A number of variables, including the employee's sex, religion, age, cultural background, or the presence of private medical conditions, disabilities, or disorders, can dramatically increase the intrusiveness of urine sampling. In the case of a female employee, it may depend upon the time of the month a sample is required. *See* Petitioners' Brief at 21, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) (No. 86-1879).

alcohol tests here are excessive. The intrusion is almost always hostile, because the individual employees are subject to the discretion of a railroad supervisor (*see infra* 33-35) and not a governmental inspector. The entire process is frightening because the employee may lose his job as a result of the test.

Another aspect of the psychological intrusiveness of the searches is that the test results could reveal evidence of a crime. Congress recently enacted the Anti-Drug Abuse Act of 1986, 45 U.S.C. § 341 *et seq.*, which provides, *inter alia*, that whoever operates or directs the operation of a common carrier (*i.e.* a railroad) while under the influence of alcohol or drugs, shall be imprisoned not more than five years or fined not more than $10,000 or both. Nothing in the regulations prevent a prosecutor from gaining immediate access to blood and urine samples, or to test results, for use in a criminal proceeding. *See* 49 C.F.R. § 219.11(d); (Pet. Br. 10, n.15). Thus, the regulation permits the Government to obtain indirectly evidence that it may not acquire directly, *i.e.*, evidence of a crime without a showing of probable cause (or even particularized suspicion). We acknowledge the dicta in *New York v. Burger*, 107 S. Ct. 2636, 2651 (1987), to the effect that "discovery of evidence of crimes" in the course of enforcing an administrative scheme does not necessarily "render that search illegal." Nevertheless, we submit that the quasi-criminal nature of the tests adds to their intrusiveness and is a factor which should be considered in determining reasonableness.

This psychological intrusion is made even more frightening because the testing is fraught with many inaccuracies. There is currently, no uniform scientific oversight of these commercial laboratories by a recognized scientific or governmental agency. The regulations require only that the laboratories perform a confirmatory procedure and shall regularly participate in an external quality control program that involves the analysis of samples submitted by a reference laboratory. (49 C.F.R. § 219.307). Some laboratories employ their own private consultants to conduct proficiency tests. However, there is no common certification standard nor proficiency testing criteria which all drug testing laboratories are required to meet. On the other hand all testing

of employees of Federal agencies are required to be performed by laboratories certified in accordance with standards established by the U.S. Department of Health and Human Services. (53 Fed. Reg. 11,970 (April 11, 1988)). The literature is replete with discussions of the incompetency of drug testing laboratories and the inaccuracy of test results. *See House Comm. on Government Operations, Failing The Test: Proficiency Standards Are Need For Drug Testing Laboratories*, H.R. Rep. No. 527, 100th Cong., 2d Sess. (1988); Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 Nova L.Rev. 605, 632 (1987); Hudner, *Urine Testing For Drugs*, 11 Nova L.Rev. 553, 554-558 (1987); L. Dogoloff and R. Angarola, *Urine Testing In The Work Place*, 20-22, the American Counsel for Education, ed. 1985; M. Rothstein, *Medical Screening Of Workers*, 71 (1984); *Warning Of Drug Test Inaccuracies*, 122 Lab. Rel. Rep. (BNA) 179, 180 (July 14, 1986). In one blind study conducted by the Center for Disease Control and the National Institute on Drug Abuse, 91% of laboratories tested had unacceptable false-negative rates for barbiturates, 100% for amphetamines, 50% for methadone, 91% for cocaine, 15% for codeine, and 92% for morphine. *See* American Medical Association, AMA News Release: *False Lab Results Compound Drug Abuse Dilemma* (April 25, 1985). (*See* J.A. 70). This may be an egregious example, but it evinces the potential for error, and highlights the psychological intrusiveness of the blood and urine tests under the regulations. The manner in which the test results are used place an enormous burden on the quality of the results. In recognition of this major problem, both houses of Congress are considering corrective legislation.[14] Breath tests, also, can produce unpredictable, and hence unacceptable, results.

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[14] On August 10, 1988, S. 2477 was favorably reported by the Senate Labor and Human Resources Committee. On August 9, 1988, H.R. 5150 was reported by the House Committee on Energy and Commerce. *See also Hearings on H.R. 5150 Before the Subcomm. on Oversight and Invesitgations of the House Comm. on Energy and Commerce*, 100th Cong. 2d Sess. (1988) (opening statement, dated July 27, 1988, of Rep. John D. Dingell, Chairman). (*See* Resp. Add. A-1). Each bill would force drug testing laboratories to increase the accuracy of their tests.

See Feldman and Cohen, *The Questionable Accuracy of Breathalyzer Tests*, 19 Trial 54 (June 1983).

Additionally, under the regulations, the blood and urine collection procedure may take several hours' time, *see* U.S. General Accounting Office, Report to the Honorable John Heinz, U.S. Senate, RAILROAD SAFETY, Reporting Time Frames and Results of Post-Accident Drug Tests, at 4 (April 1988) (GAO-RCED 88-120), during which the railroad workers are not free to leave. This has the effect of aggravating the "seizure" aspect of the testing. The railroad workers are, in effect, "under arrest" until a sample is provided.

The fact that the drug and alcohol tests are conducted as an aspect of an employment relationship does nothing to reduce the intrusiveness of the searches, or the reasonableness of railroad employees' privacy expectations. In *O'Connor v. Ortega*, 107 S. Ct. at 1498, the plurality recognized the societal expectations of privacy in one's place of work.[15] We submit, however, that the decision in *Ortega* was justified, in part, by the lesser expectation of privacy which government employees have in their place of work, as opposed to their homes, or in other contexts, *Id.* at 1498, and that greater privacy expectations are involved in this case. The drug and alcohol tests entail more than a limited invasion. The privacy interests of railroad workers in bodily integrity and control are subtantial and remain so whether the employee is at home or at work. The fact that railroad employment is safety-sensitive does not reduce the reasonableness of these privacy expectations. Significant intrusions into employees' bodies, and direct supervision of urination are neither ordinary nor necessary practices in the railroad industry. These practices, therefore, cannot be justified as "operational realities" of the workplace, especially since legitimate safety needs of the railroad can be met by less intrusive means. (*see infra* 40-45).

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15 We agree with Justice Scalia that the "identity of the searcher (police vs. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search . . . is reasonable." *O'Connor v. Ortega*, 107 S. Ct. at 1505 (Scalia J., concurring).

Finally, there are no provisions to safeguard the confidentiality of the information obtained through the alcohol and drug testing. In addition to prosecutors, the information obtained through blood and urine testing is available to the railroads, the National Transportation Safety Board, and any parties in litigation, *see* 49 C.F.R. § 219.11(d). There are no provisions in the regulation that ensure confidentiality of the results, or to prevent access by members of the general public. This adds further to the intrusiveness of the tests, in that details of one's private life become involuntarily exposed to public view.[16]

The nonconfidentiality of the test results and the inadequacy of the hearing procedures may also raise a due process issue. The employee's only procedural right at the hearing is limited to question the reasons behind the employee's refusal to take the test. 49 C.F.R. § 219.213(c). However, there are numerous factual issues that should be determined, including, but not limited to, the reliability of the particular tests given, the specific chain of command for handling the test samples, qualifications of the individuals performing the tests, determination of what medication the employee had been taking that might have cross reacted with the sample and affected the test results, etc. Without allowing this type of information to be developed at the hearing, the employee may be wrongfully discharged from employment without due process.

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16 Blood and urine tests can reveal a great deal of personal, physiological information, including various medical disorders or conditions, *e.g.* epilepsy, diabetes, depression, and pregnancy. *See Capua v. City of Plainfield*, 643 F. Supp. at 1513; Stille, *Drug Testing*, Nat'l L.J. at 23 (April 7, 1986). The regulations do not prevent a party from testing for such information.

2. The Closely Regulated Industry Exception To Particularized Suspicion Is Inapplicable To Drug And Alcohol Testing Of Railroad Workers Under The FRA Regulations.

In the courts below, the Petitioners argued that this case should be decided by the standards governing administrative searches (*see* Petitioners' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 23-29; Petitioners' Appeal Brief at 18-23). The Petitioners now have apparently retreated from that argument. While they cite administrative search cases (Pet. Br. at 23), Petitioners realize that the Court has never applied the administrative search rationale to invasive searches of individuals. This probably is the last vestige of the Fourth Amendment that the Court deems inviolable -- an individual cannot be invasively searched without at least particularized suspicion.

The Petitioners argue that the Ninth Circuit erred in not properly balancing the competing interests under the closely-regulated industry exception to particularized suspicion (Pet. Br. 23-24). This position is untenable for the obvious reason that the closely-regulated industry exception is inapplicable to railroad employees, and that balancing under this exception is unnecessary. This Court has applied the closely-regulated industry exception *only* to searches of property, involving only minimal intrusions upon privacy, and consequently the exception does not extend to searches of persons. Moreover, even if the exception were extended to persons, it should not be applied in the present case because railroad workers are not a closely-regulated industry.

1. Analysis of the case history of the closely-regulated industry exception reveals that this type of administrative search has a property based rationale. In *Camara v. Municipal Court*, 387 U.S. at 537, the Court imposed an administrative search warrant requirement prior to inspection of a dwelling for possible housing code violations. The Court recognized that the searches were "neither personal in nature nor aimed at the discovery of evidence of crime." Moreover, the search

entailed a "relatively limited invasion of . . . privacy." *Id.* In *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970), the Court held that Congress could authorize administrative searches of locked liquor storerooms because the liquor industry has long been subject to close supervision and inspection. Subsequent decisions firmly establish that such administrative searches are justified by the lesser expectation of privacy persons have over *property* in a pervasively regulated industry. *See New York v. Burger*, 107 S. Ct. at 2643. In *Marshall v. Barlow's, Inc.*, 436 U.S. at 313 the Court, White J., wrote that "certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for the proprietor over the *stock* of such an enterprise." (emphasis added). The same reasoning compelled the Court's decision in *United States v. Biswell*, 406 U.S. 311 (1972). In upholding a warrantless search of a locked gun storeroom, the Court, White, J., wrote, "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business *records, firearms,* and *ammunition* will be subject to effective inspection." *Id.* at 316 (emphasis added).

The closely-regulated industry exception evinces the fact that one's expectation of privacy with respect to commercial property is naturally lesser than other expectations of privacy. Thus, while the Court has held that commercial property is entitled to Fourth Amendment protection, *See v. City of Seattle*, 387 U.S. 541, 545 (1967), the Court has also suggested that commercial property may reasonably be inspected in many more situations than private homes. *Id.* at 546. In *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981), Justice Marshall said:

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectations of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by

regulatory schemes authorizing warrantless inspections.

Accord South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (less rigorous warrant requirements govern automobile searches "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office"). Thus, the more permissive administrative search doctrine is in fact an exception based on relatively attenuated privacy interests, and relatively unintrusive searches. Note, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking For An American Standard*, 21 Georgia L.Rev. 467, 483 (1986).

For obvious reasons, invasive personal searches, such as those mandated and authorized by the FRA regulations, can be distinguished from searches of places and effects, and must be justified independently under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. at 767-768 ("because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate"); *Accord U.S. v. Crowder*, 543 F.2d 312, 322 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 1062 (1977) ("one's body simply cannot be equated with his car, his clothing, or even his home as a repository of evidence"); *Balelo v. Baldrige*, 724 F.2d 753, 767 (9th Cir.) (*en banc*), *cert. denied*, 104 S. Ct. 3536 (1984) (applied closely-regulated industry exception in allowing the placement of observers on fishing vessel, but held that personal searches had to be "justified independently"). Because privacy expectations are greatest with respect to one's own body, the closely-regulated industry exception should not be extended to personal searches. Moreover, because drug and alcohol tests of railroad employees are highly invasive, and can reveal evidence of a crime (*see supra* at 24), the scope of such administrative searches goes beyond that which was contemplated in *Camara*, 387 U.S. at 537.

2. Even if the closely-regulated industry exception were extended to personal searches, the exception should not be applied here because railroad employees are not a closely-regulated industry. In its most recent "closely-regulated

industry" case, *New York v. Burger*, 107 S. Ct. at 2643 (1987), the Court stated that "the doctrine is essentially defined by 'the pervasiveness and regularity of the federal regulation' and the effect of such regulation upon an owner's expectation of privacy." (*quoting Donovan v. Dewey*, 452 U.S. at 605-606). The Court observed, however, that "'the duration of a particular regulatory scheme' would remain an 'important factor' in deciding whether a warrantless inspection pursuant to the scheme is permissible." *Id.*

Although railroads have long been subject to close regulation, railroad employees have not.[17] Among the railroad safety statutes only the Hours of Service Act, the Hazardous Materials Transportation Act, and the Rail Safety Improvement Act of 1988 directly concern railroad employees, and none of these has the effect of reducing employees' expectations of privacy, as required by *Burger* and *Donovan*.[18]

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17 Since 1893, Congress has enacted the Safety Appliance Act, 45 U.S. C. § 1 *et seq.*; the Block Signal Act, 45 U.S.C. § 35; the Ash Pan Act, 45 U.S.C. 17 (repealed by the Federal Railroad Safety Authorization Act of 1982, Pub. L. No. 97-468, Tit. VII, § 705, 96 Stat. 2580); the Accident Reports Act, 45 U.S. C. § 38; the Locomotive Inspection Act, 45 U.S.C. § 22; the Signal Inspection Act, 49 U.S.C. App. § 26; the Hours of Service Act, 45 U.S.C. § 61 *et seq.*; the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 *et seq.*; and, more recently, the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624.

18 The decision of the Court of Appeals for the Third Circuit in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) is distinguishable on this point. The Third Circuit applied the administrative search exception to employees in the closely-regulated horse racing industry because the employees are the "principle regulatory concern." *Id.* at 1142. By contrast, the overwhelming majority of railroad regulations concern equipment and railroads themselves. Moreover, the testing scheme in *Shoemaker* included certain provisions which added to its reasonableness. Employees there had greater rights to contest the test results; the State agreed not to seek criminal prosecution of employees testing positive for illicit drug use; the selection of employees to be tested was made by lottery, thereby eliminating discretion; and officials and supervisors were also subject to testing. Of course, we submit that the decision of the court to extend the closely-

The Hours of Service Act merely prohibits a railroad from requiring or permitting an employee to work for more than 12 consecutive hours. 45 U.S.C. § 62. This hardly has the effect of reducing employees' privacy expectations. The Hazardous Materials Transportation Act, and regulations promulgated thereunder, 49 C.F.R. § 174.1-174.840, establish criteria for handling hazardous materials, require minimum levels of training and qualification for employees, and subject employees to civil penalties for violations. We are unaware, however, that there has ever been a case against an employee under any of these provisions. Given this fact, and the fact that the provisions are narrowly focused on the transportation and handling procedures for hazardous materials, employees can reasonably continue in their expectations of privacy over bodily functions.

The same can be said for the Rail Safety Improvement Act of 1988. This newly enacted law subjects railroad employees to civil penalties for willful violations of various railroad safety laws. Furthermore, the law requires the Secretary to promulgate rules regarding the licensing of locomotive operators, including engineers. While this latter provision is a direct regulation of railroad workers, it cannot be characterized as pervasive. First of all, it applies only to operators or engineers. Second, it is more closely related to an engineer's training and qualifications than to his conduct. Under the Act, the licensing program must provide minimum training requirements for engineers, require comprehensive knowledge of railroad operating practices and rules, and require consideration of the motor vehicle driving record of each individual seeking licensing. Licensing engineers in no way regulates such employees' on the job conduct. Neither the civil penalty provision nor the licensing provision is related to alcohol/drug regulations. Thus, railroad employees'

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regulated industry exception to persons is constitutionally misguided, and must be rejected. *See* Note, *Shoemaker v. Handel and Urinalysis Drug Testing: Looking For An American Standard*, 21 Georgia L.Rev. 467 (1986).

expectations of privacy over their bodies and bodily fluids have not been affected by the new legislation.

In addition, the recent enactment of the Rail Safety Improvement Act, subsequent to the promulgation of the FRA rule and the commencement of this suit, clearly demonstrates that railroad employees do not have a history of direct governmental oversight. Since the length of close regulation is an important factor under *Burger*, 107 S. Ct. at 2643, and since the regulation of employees, *per se*, is not pervasive, the Court should not deem such employees a closely-regulated industry.

3. There Are Inadequate Safeguards Available To Assure That The Railroad Employees' Reasonable Expectation Of Privacy Are Not Subject To The Discretion Of The Official In The Field.

Contrary to the assertions by Petitioners, the railroad supervisory personnel are given great discretion in determining whether a test is to be conducted. The most obvious concern is that it is the railroad supervisor, and not a federal or state inspector, whose discretion is involved. The railroad supervisor alone determines whether the conditions precedent set out in the regulations have been met. This creates further potential for harassment,[19] which is not present in searches by federal or state inspectors.

Under 49 C.F.R. § 219.201(a)(1) and (a)(2) the railroad supervisor is required to make an immediate on-the-scene evaluation as to the amount of property damage. He or she is given complete discretion to make such a judgment, even though there is no requirement in the rule that such person be trained in assessing monetary damages to equipment. The absurdity of the section is highlighted by the example of an accident which occurred on the Norfolk and

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19 The recently enacted Rail Safety Improvement Act of 1988 (P.L. No. 100-342, 102 Stat. 624, acknowledges the continued existence of harassment problems in the railroad industry. (*See* sec. 5).

Western Railroad on May 18, 1986. There, the chairman and chief executive officer of the parent railroad was operating an excursion train at the time of a derailment. A total of 14 cars were damaged and there were 177 injuries in the accident. It is questionable whether anyone would tell the CEO of the railroad that he should undergo an alcohol or drug test. The President of the railroad, who was not even at the scene of the accident, determined that the dollar threshold for testing had not been met. Also, there was considerable confusion as to the identity of the appropriate senior official entrusted with the decision on whether or not to test. *See* National Transportation Safety Board Railroad Accident Report on Derailment of Steam Excursion Train Norfolk and Western Railway Company Train Extra 611 West, Suffolk, Virginia, May 18, 1986 (Rept. No. NTSB/AAR-87/05) at pp. 48-49. Another example of the wide discretion afforded officials in the field is seen in the aforementioned Arkansas accident (J.A. 137-139), in which tornado-like winds caused a train to derail. Though an act of God was clearly the cause of the derailment, a railroad official decided to test the entire train crew. (*See* J.A. 137-139; *see also* J.A. 141-146).

Another aspect of the rule which demonstrates lack of safeguards for the employee is that Subpart D allows testing based upon certain rule violations. *See* 49 C.F.R. § 219.301(b)(3). It is the supervisory personnel alone who determines whether or not the rule which triggers the test has been violated. Moreover, even under 49 C.F.R. § 219.301(b)(1), which satisfies a particularized suspicion standard, the supervisor needs to have only 3 hours of specialized training in detecting the signs of drug intoxication. *See* 49 C.F.R. § 219. 301(c)(2)(ii). Greater training of supervisors is needed if unnecessary testing is to be curtailed.

The ultimate discretion is delegated to the railroads by allowing them to perform tests under any conditions they may wish. *See* 49 C.F.R. § 219.305(e). As a result of this provision, some railroads are mandating additional tests but not requiring confirmation, due to the additional expense involved. Moreover, the laboratories used are not of the highest calibre, thereby raising questions of reliability, and chain of custody problems preclude accurate identification of one's specimen. False positives can arise in several ways.

There are various urinalysis tests now being marketed. They are generally reliable, but no one can assert that any of them is infallible. Even a small error rate becomes significant when large numbers of samples are tested, such as in the railroad industry. A urine specimen may be mislabeled, mishandled, contaminated on the way to or at the drug testing laboratory itself, or possibly deliberately switched. All of these problems can and do exist without any constraints upon the railroads.

Because drug and alcohol tests entail significant intrusions into reasonable privacy expectations, and because there are insufficient safeguards to limit the discretion of the official in the field, the Court's decision in *T.L.O.* compels to conclusion that tests conducted in the absence of individualized suspicion are unconstitutional. *See T.L.O.*, 469 U.S. at 342, n.8. Suspicionless drug and alcohol testing is certainly an arbitrary governmental invasion, against which the Fourth Amendment was designed to protect.

A decision permitting suspicionless blood and urine testing of railroad workers following accidents, incidents, or rule violations would completely eviscerate the Fourth Amendment. Such a decision logically would permit suspicionless testing of motorists and vehicle occupants following accidents or motor vehicle violations. Similarly, governmental regulation of the private sector workplace could permit testing after any accident or minor rule violation. Moreover, such a decision would permit the anomaly of providing greater Fourth Amendment protections to criminals than to law abiding citizens. *See Camara*, 387 U.S. at 530.

D. The FRA Regulations Do Not Serve Compelling Governmental Interests

As previously stated (supra at 1-2), Respondents do not question that the government should secure the safety of the public and employees by preventing alcohol and drug impairment. However, we differ strongly in the method employed to reach this worthy goal.

The "compelling governmental interests" argument by the Petitioners fails when it is compared to other interests such

as the ever present concerns with crime -- which, of course, requires probable cause for searches. If governmental interests were the criterion for personal searches which did not require individualized suspicion, then the Fourth Amendment would lose all vitality. The Court has determined that the government must show more. See *O'Connor v. Ortega*, 107 S. Ct. at 1500 (plurality opinion) and 1506 (opinion of Scalia, J., concurring); *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

The Petitioners' justification for their alleged "compelling governmental interests" are (1) the deterrent effect of the regulations (Pet. Br. 38), (2) the testing would permit the agency to determine with greater precision the causes of major accidents (Pet. Br. 39) and (3) that the FRA is not required to adopt less intrusive alternatives. (Pet. Br. 39). Each of Petitioners' arguments is flawed.

1. The Regulations Will Not Result In Any Greater Deterrence

It is a hotly debatable point whether the regulations actually deter alcohol and drug usage. It is just as valid to assert that the regulations do not really create any greater deterrence. We are unaware of any recognized studies which demonstrate that compulsory toxicological testing is a deterrent to use. An employee who is not already deterred by the risk of an accident while impaired is not likely to be deterred by the risk of a post accident test. The truth is that alcohol and drug users do not believe they will be caught by any web of testing.

Based on the Petitioner's rationale, any testing that deters, no matter how invasive or intimidating, would be constitutional. If that were the criterion, the entire U.S. workforce and all motorists could be tested after any random event such as an accident or rule violation. It may have some deterrent effect, but the cost of any alleged deterrence in terms of constitutional rights is excessive. As pointed out in *Patchogue-Medford Congress of Teachers v. Board of Education*, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) ". . . [i]f random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so."

There comes a point at which searches intended to serve the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy, dignity, and security of railroad workers. The FRA regulations far exceed that point. A testing program which inflicts a substantial invasion of privacy on the thousands of employees in order to allegedly deter conduct of a few must be deemed overly intrusive and unconstitutional.

2. Obtaining Better Data Concerning Causes of Accidents Does Not Justify Invasive Testing

The Petitioners' next contention *i.e.* the FRA will obtain better data concerning causes of accidents, does not justify invasive testing based upon nonparticularized suspicion either. The cause of railroad accidents can be determined by lesser intrusions (*see infra* 40-43), and still reliable evidence can be gathered concerning its cause. We do not question that the public interest justifies determining the cause of each railroad accident. Rather, the issue is whether the government is prevented from ascertaining the cause of an accident if particularized suspicion is required before a search is permitted. It clearly is not if the other less intrusive means identified in this brief are adopted. Also, *Schmerber v. California*, 384 U.S. at 770 teaches us that:

> . . . human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

A parallel exists here with respect to officials seeking to determine the cause of a recent fire. In *Michigan v. Clifford*, 446 U.S. 287, 294 (1984) the Court said that "If the primary object is to determine the cause and origin of a recent [accident], an administrative warrant will suffice." Once the

railroad accident or rule violation which triggers the test has occurred, the exigent circumstances are over.

Thirdly, the Petitioners argue that adoption of less intrusive means is not required, and that its examination of other options were found to be wanting (Pet. Br. 39). It may be that the alternative referred to in its Brief at 5-6 and fn. 6 alone may not be the answer. However, when combined with the approaches suggested herein, then the public interest for a safe railroad system free from alcohol and drugs can be achieved.

3. The Regulations Must Be More Narrowly Drawn Because Drug And Alcohol Testing Infringes Upon Fundamental Constitutional Rights.

The Court has stated that the "reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). This is in recognition of the fact that "'creative judge[s], engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (*quoting United States v. Sharpe*, 470 U.S. 675, 686-687 (1985)). Nevertheless, case law clearly reflects that the existence of less intrusive means is an important factor to consider in determining the reasonableness of governmental action.

The Court has held that, despite a substantial state interest, "if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference," but "must choose 'less drastic means.'" *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (*quoting Shelton v. Tucker*, 364 U.S. 479, 488 (1961)). *See also Roe v. Wade*, 410 U.S. 113, 115 (1973).

The Court has repeatedly stated that Fourth Amendment searches may not be overly broad in scope. In *Terry v. Ohio*, 392 U.S. at 19 (*quoting Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)), the Court held that the scope of a pat-down search "must be 'strictly tied to and justified by the circumstances which rendered its initiation permissible." *Cf. New Jersey v. T.L.O.*, 469 U.S. at 341 (requiring that searches of students by school officials be reasonably related in scope to the circumstances which justified the search); *O'Connor v. Ortega*, 107 S. Ct. at 1503. This analysis has been followed by several lower courts in the same context. Regarding airport screening searches, the Court of Appeals for the Ninth Circuit stated that the legitimate and substantial governmental purpose "'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973) (*quoting Shelton v. Tucker*, 364 U.S. 479, 488 (1961)). Regarding courthouse magnetometer searches, the Ninth Circuit stated that the "search must be limited and no more intrusive than necessary to protect against the danger to be avoided . . . ." *McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978). The court, Kennedy, J., upheld the search because, *inter alia*, the inspection "was conducted in the least intrusive manner possible." *Id.* at 900. Regarding drug testing of correctional institution employees, the U.S. District Court for the Southern District of Iowa held that such searches "must be guided by some appropriate standards, and must be no more intrusive than is reasonably necessary." *McDonell v. Hunter*, 612 F. Supp. 1122, 1128-1129 (S.D. Iowa 1985), *aff'd.*, 809 F.2d 1302 (8th Cir. 1987).[20]

In addition to the infringement upon railroad employees' Fourth Amendment right to be free from unreasonable searches and seizures, the regulations

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[20] Even in the context of closely regulated industries, where searches may be conducted on less than individualized suspicion, the Court has required that the regulatory searches be narrowly drawn. Thus, in *New York v. Burger*, 107 S.Ct. 2636, 2644 (1987) (*quoting Donovan v. Dewey*, 452 U.S. at 600), the Court required that the warrantless inspections be "'*necessary* to further [the] regulatory scheme.'" (emphasis added).

impermissibly slight their fundamental constitutional rights to liberty and privacy. It is beyond dispute that liberty is a fundamental right. Recognized as an "inalienable right" in the Declaration of Independence, liberty subsequently became an integral part and essential concept of the Bill of Rights. As stated by the Court in *Terry v. Ohio*, 392 U.S. at 9 (*quoting Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891)):

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Despite the lack of explicit mention in the Constitution, the Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152.[21] These privacy aspects, and the railroad workers' liberty interests, constitute rights which are "fundamental" and "implicit in the concept of ordered liberty." *Id.; see Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As such, the Court's decisions in *Roe v. Wade* and *Dunn v. Blumstein* require that the FRA regulations be narrowly drawn, and no more intrusive than necessary

There are presently available a number of less drastic and equally effective means to address the legitimate governmental concerns, while at the same time not unduly

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[21] One noted commentator, Professor Philip B. Kurland, identifies at least three facets of the largely undefined privacy right: "The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from government compulsion." Kurland, *The Private I*, University of Chicago Magazine 7, 8 (autumn 1976) (*quoted in Whalen v. Roe*, 429 U.S. 589, 599, n.24 (1977)).

depriving innocent railroad employees of their constitutional rights. For example:

(a) Rule G, in effect on virtually every railroad, prohibits the possession or use of alcohol or drugs. This rule evinces the railroads' efforts to combat alcohol and drug use through traditional disciplinary methods.

(b) Second, there are voluntary co-operative agreements between the employees and major carriers which have shown to be very effective in reducing alcohol and drug use on the railroads. These programs are identified as Employee Assistance Programs and/or Operation Redblock. For example, the Brotherhood of Locomotive Engineers and the United Transportation Union in cooperation with railroads have responded to the alcohol and drug issue by a five-step drug and alcohol prevention program. (*See* J.A. 111-112). Although the FRA in its rulemaking described these various cooperative programs, *see* 50 Fed. Reg. 31,510 (August 2, 1985); 48 Fed. Reg. 30,723-30,732 (July 5, 1983); 49 Fed. Reg. 24,266-24,271 (June 12, 1984), the agency failed to adequately analyze the plans' effectiveness. Some major railroads presented documentation in the rulemaking record which clearly demonstrated that the voluntary programs were working. *See In Re: Control of Alcohol and Drug Use In Railroad Operation, Advance Notice of Proposed Rulemaking, Docket No. RSOR-6: Hearings Before the Federal Railroad Administration*, September 1, 1983, 273-282 (statement of Darrell Sorenson, Dir. of Employee Assistance Program, Union Pacific Railroad); *Hearings*, September 2, 1983, 123-133 (statement of William F. Howe, Vice-President of Casualty Prevention and Glen P. Michael, Assistant Vice-President for Labor Relations, Chessie System Railroads).

(c) Other less intrusive means include those aimed at improved detection. On October 10, 1986, the Secretary hailed a program developed by the Los Angeles Police Department as a potential breakthrough in the detection of drug-impaired persons. (J. A. 173). A laboratory evaluation of this program, conducted at Johns Hopkins University, and jointly sponsored by the National Institute on Drug Abuse and DOT's National Highway Traffic Safety Administration, showed that the police officers were over 98 percent accurate

when they identified a subject as having taken a drug. (J. A. 174). A follow-up field study determined that the LAPD drug recognition procedure "enables the experienced police officer to accurately recognize the symptoms of many types of drug use by drivers." (J. A. 182-183). This type of program, if instituted on the nation's railroads, would accomplish the government's goal of detecting impaired employees without subjecting innocent employees to more invasive blood and urine tests.[22]

(d) Additional detection methods, which require far less training and are easier to administer, include those currently being used by police nationwide to test for impairment. Such roadside sobriety tests, as well as the aforementioned LAPD procedure, are less intrusive because they do not require providing blood, breath, or urine samples; they do not require time consuming transport to medical facilities, and the restraint of liberty which that entails; and they do not require tested individuals to reveal legitimate drug intake as a precaution against false positives in fluid testing. Such testing would be an effective method in determining which railroad employees are obviously not impaired, and which employees should be subjected to more intrusive blood or urine tests.[23]

(e) Another less intrusive means would be for the FRA to require railroad supervisory personnel to observe crew members when they go on and off duty. Supervisors can be trained to effectively detect employees who are impaired by drug or alcohol use without resorting to such intrusive procedures

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22 The LAPD drug evaluation procedure consists of three relatively unintrusive components: an interview concerning the suspect's medical history; measuring physiological symptoms such as pulse rate, pupil size, etc.; and behavioral tests designed to assess psychomotor performance. (J.A. 179-180).

23 For an example of a typical roadside sobriety test, *see* Wingleth & Stevens, *Evidentiary Aspects of Alcohol Ingestion*, in *Handling the D.U.I. Case* (1980) (published by Continuing Legal Education in Colorado, Inc., and the Colorado Bar Association Committee on Alcohol-Related Problems) (quoted in *People v. Carlson*, 677 P.2d at 316-317).

as blood and urine tests. *See Taylor v. O'Grady*, 669 F. Supp. at 1432. Supervisors, with limited training, could also conduct the above-mentioned sobriety test upon any employee whose appearance or behavior merits further investigation. *See Id.* at 1433. Blood or urine samples could then be required of any employee who fails a sobriety test. This would have the effect of transforming all testing into reasonable suspicion testing, as to which the Respondents have no dispute. Moreover, this would have a tremendous deterrent effect on drug users, thereby fulfilling another FRA purpose in testing.

These less intrusive means, or a combination thereof, would be very effective in detecting drug or alcohol impaired employees, and in deterring alcohol or drug use on the job. Because the FRA did not adopt these alternatives, the regulations are not narrowly drawn. For this reason, 49 C.F.R. Part 219 violates the Constitution.

E. The Implied Consent Specified In 49 C.F.R. § 219.11 Cannot Validate An Otherwise Unreasonable Search.

a. The Court has rejected the theory that public employment which may be denied altogether may be subjected to unreasonable conditions. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *see also Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926) (if the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all). Several lower courts have relied upon this reasoning to hold that a search otherwise unreasonable cannot be redeemed by a public employer's exaction of a "consent" as a condition of employment. *See RLEA v. Burnley*, 839 F.2d at 589; *National Federation of Federal Employees v. Weinberger*, 818 F.2d at 942; *Lovvorn v. City of Chattanooga*, 846 F.2d at 1548; *McDonell v. Hunter*, 809 F.2d at 1310; *Cf. Farris v. United States*, 24 F.2d 639, 640 (9th Cir.) *cert. denied*, 277 U.S. 607 (1928) (search of a dwelling house without a warrant, though without objection by owner, held unlawful).

Logically, this same reasoning extends to the implied consent specified in 49 C.F.R. § 219.11. Although railroad workers are private sector employees, the government is imposing conditions on that employment by implying consent to drug tests. Such an exaction impermissibly compels the surrender of railroad workers' Fourth Amendment rights. As expressed in *McDonell v. Hunter*, 809 F.2d at 1310, "Advance consent to future *unreasonable* searches is not a reasonable condition of employment." (emphasis in original). For this reason, the Court of Appeals was correct in stating that a constitutionally unreasonable search cannot be saved by DOT's implied consent requirement. 839 F.2d at 589.

b. It is well-settled that a search conducted pursuant to a *valid* consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Katz v. United States*, 389 U.S. at 358 (emphasis added). It is equally well-settled, however, that consent, to be valid, must be freely and voluntarily given. *See Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment requires that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. *Schneckloth*, 412 U.S. at 228. Analogizing to cases of forced confessions, Justice Stewart in *Schneckloth* wrote: "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" 412 U.S. at 225 (*quoting Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

In the context of railroad workers and 49 C.F.R. § 219.11, the answer to this question, clearly, is no. An employee who chooses not to provide a blood or urine sample following an accident or incident will be disqualified and withdrawn from covered served for a period of nine months. 49 C.F.R. § 219.213. The coercive effect of this penalty is manifest. The DOT has suggested that employees can avoid exposure to the searches by leaving covered service altogether. (Petitioner's Appeal. Br. 40). This is simply not a reasonable choice to place on employees, many of whom have spent a lifetime building a career in covered service, and for whom re-employment elsewhere in a similar position would be

impossible. An option to provide blood or urine samples or to effectively lose your job is no choice at all. As stated by Justice Douglas in the analogous case of *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (wherein police officers were questioned and threatened with removal from office for refusal to answer), "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

Because consent is not freely given, and is the product of unreasonable pressure, the implied consent specified in 49 C.F.R. § 219.11 violates the Fourth Amendment.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

OPENING STATEMENT

FOR

THE HONORABLE JOHN D. DINGELL

CHAIRMAN

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Wednesday, July 27, 1988

Today, the Subcommittee will examine the capability of clinical laboratories to establish and maintain the standards necessary to assure the utmost in accuracy, reliability, security, and confidentiality. This Subcommittee has legislative oversight responsibility for health and health facilities.

The Rules of the House require us to examine whether existing laws and regulations are adequate and are being adequately enforced. If the answers to the Subcommittee's questions today show they are not, then we must examine how we can insure that tests are fairly conducted, their results are accurate, and the public health and welfare is promoted.

Accidents involving substance abuse as a possible contributing cause are increasing. Productivity in the workplace is being lost because of alleged drug and substance abuse. The response of business and industry to this crisis has been overwhelming. More and more companies are implementing drug testing programs in an effort to stem the use of illegal drugs by their workforce.

Although drug testing has been ongoing for almost ten years, private labs conducting drug tests remain uniquely

unregulated. Many in the laboratory industry are quick to assure the Subcommittee that the threat of litigation and the standards recently promulgated by the National Institutes of Drug Abuse to regulate labs testing Federal employees will sufficiently police the drug testing laboratory industry. This argument is as convincing as the Defense Department's assurances that self policing will eliminate waste, fraud, and abuse among the national defense contractors. We know what happened there.

In a highly competitive industry without regulations or requirements, cost is the primary determinant of selection, and the lowest bidder will prevail. Unfortunately, when costs are cut, quality usually suffers as higher volume is demanded, and capital equipment and manpower is maximized, often beyond prudent levels. In the drug testing industry, a high degree of professional competence, concentration, and skill is essential because poor testing has the potential to profoundly affect the public. This very lack of control is the catalyst for, at best, a national embarrassment and, at worst, a disaster.

Today, we will examine two cases involving employees in the private sector who allege that drug testing improperly found them guilty of drug use.

-- Collette Clark, a data entry operator with the San Diego Gas and Electric Company, lost her job after her drug test showed positive for marijuana. Only after Ms. Clark filed a lawsuit and obtained services of an attorney, was it determined that not only were the results of her tests invalid, but the confirmatory test, which the laboratory claimed it conducted, was, in fact, never done.

-- Alan Pettigrew, an employee with Southern Pacific Transportation, was required to undergo a month's rehabilitation for what he alleges was an incorrect result on a drug test. Only after three years of litigation was his case against his employer settled. Mr. Pettigrew claims that the cost to his family and to himself was and still is devastating. Although his employer maintains that it was satisfied with the results of his initial test, records show a gap in the chain of

custody of his urine sample at least one of the two laboratories which conducted his urine test.

We suspect there are a vast number of others who have neither the resources nor the knowledge to seek legal assistance or to pursue remedies that might vindicate them.

We will also look at the way employers use lab testing. In the two cases under review today, both selected what they considered reputable labs. Amazingly, no contract was in place to assure Ms. Clark's employer that the laboratory would perform the tests as agreed. In Mr. Pettigrew's case, one of the laboratories has reported to the Subcommittee that Southern Pacific elected not to ask for a chain of custody. An expert witness has testified in private litigation that no record of the proper chain of custody existed and the interpretations were not reliable.

Other witnesses, today, will testify to the current state of drug testing. We will hear from forensic toxicologists and pathologists who have observed that many laboratories are not equipped, nor do they understand the controls necessary to handle forensic drug testing standards. Many laboratories cannot or will not invest resources to maintain properly secured facilities, qualified personnel, testing methodologies, quality assurance, documentation, and interpretation of analysis results.

We will also hear from an attorney who has represented over 600 servicemen whose drug test results were questioned and found invalid due to improper procedures. The laboratory which conducted these drug tests is considered one of the foremost forensic drug testing laboratories in the country. If the test on 600 servicemen were questionable, what can we expect from the hundreds of unlicensed and unregulated laboratories conducting drug tests?

We also hope to learn more about how business seeks a laboratory to test its employees or applicants. We will hear testimony today showing how the lack of technical expertise among businesses is a widespread and fundamental problem in drug testing. There seems to be a disturbing detachment among companies related to the laboratories they engage.

Many rely on the limited expertise of untrained human resource or medical personnel to select a laboratory. This can and frequently has had devastating effects on their employees.

Our final two witnesses take us into the operations of one of the nation's largest laboratories. National Health Laboratories is one of the top six laboratories in the country and currently provides drug screening services for a number of companies. It currently conducts approximately half a million drug screening tests a year. Ms. Dolly Scott, a former National Health Laboratories employee, is expected to testify that quality problems in numerous areas of clinical testing, including drug tests, were widespread and unchecked in its San Diego facility. Her testimony raises disturbing questions about the capability of clinical laboratories to conduct both clinical and forensic drug tests.

Our last witness, Mr. Robert Draper, President of one of the nation's largest laboratory chains, will testify that National Health Laboratories has devoted extensive resources to quality control among the 15 major laboratories within NHL. In fact, he points out that NHL, to his knowledge, is a leader in assuring quality control within the laboratory industry. If that is the case, then our proposed legislation, which addresses minimal quality assurance, is coming none too soon.